STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant/Cross-Appellee, v DWIGHT-STERLING DAVID JAMBOR, Defendant-Appellee/Cross-Appellant.	FOR PUBLICATION May 2, 2006 9:00 a.m. No. 259014 Oakland Circuit Court LC No. 2004-194043-FH Official Reported Version

Before: Cooper, P.J., and Cavanagh and Fitzgerald, JJ.

FITZGERALD, J.

The prosecution appeals as of right the trial court's order dismissing defendant's criminal prosecution for breaking and entering a building with intent to commit larceny. The court dismissed the case after granting defendant's motion to exclude evidence of four white fingerprint cards, one of which contained defendant's latent fingerprint, on the ground that the prosecution failed to lay a proper foundation for admission of the white cards. Defendant cross-appeals, challenging the denial of his motion to exclude evidence of three black fingerprint cards, none of which contained his latent fingerprints. We affirm.

I. Basic Facts

Defendant was charged with breaking and entering a building with intent to commit larceny, MCL 750.110. The charge arose from an incident at the Bloomfield Surf Club in Bloomfield Township. Bloomfield Township Police Officer Paul Schwab was dispatched to investigate the incident. He concluded that the perpetrator had gained entry by breaking a sliding glass window, and that approximately $50 had been stolen from an unlocked cash box. Evidence technician Robert Brien processed the crime scene, lifted fingerprints, and applied the prints to cards. Brien stated in his report that the latent prints from the point of entry and the cash box had been placed on file. By all accounts, at the time the prints were lifted, no potential suspects existed.

The latent prints were forwarded to the Oakland County Sheriff 's Department and placed in the Automated Fingerprint Identification System (AFIS). Eventually, the AFIS identified one latent print on a white card as matching defendant's right middle finger, and defendant was

charged with breaking and entering in connection with the incident. Defendant waived a preliminary examination and was bound over for trial.

Brien died before trial, and defendant subsequently moved to exclude seven cards containing latent prints purportedly gathered by Brien at the crime scene on the ground that they constituted inadmissible hearsay. Each of the seven cards had a latent print on one side and Brien's signature, the location of the lift, and information regarding the offense, including the complaint number and date, on the other side. Three of the seven cards were black and contained latent prints purportedly lifted from the cash box. It is undisputed that none of the latent prints on the black cards match defendant's fingerprints. The other four cards, one of which contained a latent print that matched defendant's fingerprint, were white and contained latent prints purportedly lifted from the sliding glass window. Following an evidentiary hearing, the trial court granted defendant's motion to exclude the four white cards on the ground that the prosecution failed to lay a proper foundation for admission of the white cards. The court denied defendant's motion to exclude the three black cards.

II. The White Cards

The prosecution argues that the trial court erred by concluding that the prosecution failed to provide the proper foundation for admission of the four white cards. We disagree.

This Court reviews for an abuse of discretion a trial court's decision to admit or exclude evidence. *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). We also review for an abuse of discretion the trial court's decision whether a proponent has sufficiently authenticated an item for admission into evidence. An abuse of discretion exists if an unprejudiced person would find no justification for the court's ruling. *People v Ford*, 262 Mich App 443, 460; 687 NW2d 119 (2004). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

The prosecution argues that the white cards are admissible under the business records exception, MRE 803(6), or the public records exception, MRE 803(8), to the hearsay rule. But even if an exception to the hearsay rule would allow admission of the evidence, the exception does not absolve the offering party from the usual requirements of authentication.[1] Before demonstrative evidence can be admitted at trial, it must be properly authenticated or identified. "The burden rests with the party seeking to admit the evidence to show that the foundational prerequisites have been satisfied." *People v Burton*, 433 Mich 268, 304 n 16; 445 NW2d 133 (1989). The proper foundation for admissibility of evidence is governed by MRE 901(a), which states, "The requirement of authentication or identification as a condition precedent to

[1] Our concurring colleague agrees that the prosecution failed to establish a foundation for the admission of the evidence, but additionally determines that the cards are hearsay that is not within any exception. We find it unnecessary to address this issue in light of our determination that the prosecution failed to properly authenticate the evidence.

admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." See also *People v Furman*, 158 Mich App 302, 331; 404 NW2d 246 (1987). Under MRE 901(b)(1), testimony of a witness with knowledge that "a matter is what it is claimed to be" can be used for authentication or identification.

The initial issue before this Court concerns the existence of foundational support for the prosecution's claim that the white cards contain latent prints that were actually lifted by Brien at the scene, i.e., that they are what they purport to be. The prosecution sought to authenticate the evidence primarily through the testimony of Schwab and the content of the cards themselves. Schwab testified that he arrived at the crime scene at approximately 11:30 a.m. and that Brien arrived after that. Schwab testified that he assisted Brien and "watched" Brien process the crime scene. He observed Brien apply graphite dust to the areas around the sliding glass window and the cash box, and then apply clear tape to lift the prints. Schwab explained that Brien then attached each piece of tape to one side of a black card and wrote on the other side of the black card. Schwab did not know the content of Brien's writing on the back of the cards at that time. Schwab testified that he observed Brien use only black cards, and there was no testimony that Brien used any white cards to process the crime scene. Schwab admitted that he could not state with certainty that the cards were prepared on August 20, 2003, absent the handwriting on the cards, and that he would have to rely on Brien's handwriting on the cards to know the location from which each print was lifted. In a supplemental police report prepared after Brien's death for the purpose of assisting in the admission of the latent prints on the cards, Schwab stated that he watched Brien lift "3 to 4 prints" with tape from the area surrounding the sliding glass window and "watched Brien secure the tape to a piece of black cardboard . . . ." In response to the trial court's inquiry, the prosecution was not able to offer a plausible explanation for the discrepancy between the color of the white card bearing defendant's latent fingerprint and Schwab's testimony.

Additionally, the prosecution relied on Schwab's and Bloomfield Township Detective James Cutright's identification of Brien's signature on the white cards, as well as Schwab's testimony that the correct complaint number, offense, and date were listed on the white cards in Brien's handwriting. But the initial issue before this Court is not the authenticity or identification of the handwriting on the white cards as Brien's; rather, it is the existence of foundational support for the prosecution's claim that the white cards contain latent prints that were actually lifted from the crime scene, i.e., that they are what they are claimed to be. *Furman*, *supra* at 331. While one could speculate why defendant's latent fingerprint was on a white card rather than a black card, such speculation is not a sufficient basis to find that the trial court abused its discretion. *Ford*, *supra* at 460. Under these circumstances, we find that the trial court did not abuse its discretion by concluding that the prosecution failed to authenticate the four white cards and that the proper foundation for admission of the evidence was not established.[2]

[2] Under these facts, the prosecution's argument regarding the chain of custody is premature. *"Once a proper foundation has been established*, any deficiencies in the chain of custody go to
(continued…)

In light of our holding that the trial court did not abuse its discretion by excluding the white cards on the ground that the prosecution failed to provide a proper foundation for admission of the evidence, the issues whether the white cards are admissible under the hearsay exceptions contained in MRE 803(6) or (8) and whether admission of the white cards would violate defendant's right of confrontation under *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004), are moot. As a general rule, an appellate court will not review a moot issue. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

III. The Black Cards

We also find it unnecessary to address defendant's issues on cross-appeal concerning the admissibility of the three black cards. None of the latent fingerprints on the black cards matched defendant's fingerprints. Because we have concluded that the white card containing the latent fingerprint was properly excluded, and because the prosecution concedes that dismissal is required without the white card, consideration of this issue is not necessary.

Affirmed.

Cavanagh, J., concurred.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh

(…continued)

the weight afforded to the evidence, rather than its admissibility." *People v White*, 208 Mich App 126, 133; 527 NW2d 34 (1994) (emphasis added).